

Katan Group, LLC v CPC Resources, Inc.
2012 NY Slip Op 33224(U)
April 30, 2012
Sup Ct, NY County
Docket Number: 650664/12
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN
Justice

PART 3

Index Number : 650664/2012
KATAN GROUP, LLC
vs.
CPC RESOURCES, INC.
SEQUENCE NUMBER : 002
PREL INJUNCTION/TEMP REST ORDER

INDEX NO. 650664/2012
MOTION DATE 4/16/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to/for TRO/ Preliminary Injunction

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4-30-12

[Signature]
HON. EILEEN BRANSTEN

- 1. CHECK ONE: ... CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

-----X

KATAN GROUP, LLC,
individually and derivatively as a member
of Refinery Management LLC,

Plaintiff,

-against-

Index No. 650664/12
Motion Date: 4/16/12
Motion Seq. No.: 002

CPC RESOURCES, INC., CPCR OPPORTUNITY
FUND II, LLC, and JOHN DOES 1-20 inclusive,

Defendants.

-----X

BRANSTEN, J.

In motion sequence number 2, Plaintiff Katan Group, LLC (“Plaintiff”) moves for a temporary restraining order and preliminary injunction against defendants CPC Resources, Inc. (“CPCR”), CPCR Opportunity Fund II (“Fund”) and John Does 1-20 inclusive (collectively “Defendants”). Plaintiff seeks to enjoin Defendants from causing Refinery Management LLC (“Refinery Management”), an entity owned jointly by Plaintiff and Defendants, to cause Refinery LLC (the “Fee Owner” or the “Refinery”), an entity wholly owned by Refinery Management, to enter into a transaction (the “Proposed Transaction”) with its mortgage lender, Domino Mezz Holdings, LLC (the “Lender”). Plaintiff also moves for expedited discovery in aid of its request for a preliminary injunction.

On March 6, 2012, this court denied Plaintiff’s request for a temporary restraining order and for expedited discovery. *See* Transcript in the Oral Argument of March 6, 2012 (Angela Bonello, S.C.R.), pp. 26-27, 29-30. The court discusses Plaintiff’s motion for a

preliminary injunction herein. Oral argument on the preliminary injunction was held on April 5, 2012. *See* Transcript in the Oral Argument of April 5, 2012 (Margaret Baumann, O.C.R.) (“April 5, 2012 Transcript”). The motion was fully submitted on April 16, 2012.

1. Background

i. Purchase of the Property

In spring 2004, Plaintiff and the not-for profit entity Community Preservation Corporation (“CPC”) agreed to partner together to purchase and acquire property parcels commonly known as the Domino Sugar refinery facility in Williamsburg, Brooklyn. Plaintiff’s Verified Complaint (the “Complaint”), ¶¶ 24, 31. These parcels are officially identified as Block 2414 Lot 1 and Block 2428 Lot 1 (collectively the “Property”). *Id.* at ¶ 19. Under the agreed-upon structure, CPC’s for-profit subsidiary, Defendant CPCR, would participate in the purchase and sale of the Property on behalf of CPC. *Id.* at ¶ 31.

In order to acquire the Property, Plaintiff and CPCR formed two entities: Refinery Management LLC (“Refinery Management”) and the Refinery LLC (the “Refinery” or the “Fee Owner”). *Id.* at ¶ 32. The Fee Owner was to purchase and develop the property and Refinery Management was to be the one hundred percent owner of Refinery. *Id.* at ¶ 33.

Plaintiff and CPCR executed the Operating Agreement of Refinery Management LLC on or about June 16, 2004. *Id.* at ¶ 11. Plaintiff, CPCR and Defendant Fund executed Refinery Management’s Second Amended and Restated Operating Agreement (the “Second Operating Agreement”) on or about September 10, 2007. *Id.* at ¶ 12. Under the current

Second Operating Agreement, Plaintiff owns fifty percent of Refinery Management. Defendants collectively own the other fifty percent. Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction ("Defendants' Memo"), p. 4.

On or about May 25, 2004, the Fee Owner entered into a Purchase and Sale Agreement (the "PSA") with Domino Sugar for the acquisition of the Property. *Id.* at ¶ 34. The purchase price for the Property was \$55 million. *Id.* at ¶ 35. As of the signing of the Second Operating Agreement, Plaintiff and collectively Defendants had each made \$10 million in capital contributions to Refinery Management. *See* Second Operating Agreement, Ex. A. Refinery Management had also obtained a \$125 million loan secured by a mortgage on the Property¹ (the "Domino Mezz Loan") from Domino Mezz Holdings, LLC (the "Lender").

ii. *Refinery Management's Second Operating Agreement*

a. *CPCR's Management Powers*

Defendants argue that Plaintiff is not entitled to enjoin Defendants from effecting the Proposed Transaction. Defendants contend that CPCR, not Plaintiff, is the sole manager of Refinery Management.

Refinery Management's Second Operating Agreement provides that "the full powers of [Refinery Management] shall be exercised by or under the authority of, and the business affairs of [Refinery Management] shall be managed solely under the direction of the

¹ The parties state in different places that there is approximately \$125 million due and \$128 million due under the Domino Mezz Loan. This discrepancy in amount owing does not in change the court's analysis herein. For the purposes of the instant motion, the court uses the \$125 million figure.

Managing Member.” Affidavit of Itzhak Katan in Support of Plaintiff’s Motion for a Preliminary Injunction (“Katan Aff.”), Ex. E (“Second Operating Agreement”), § 6(a).

CPCR is the Managing Member under the agreement. *Id.* at p. 2.

The agreement goes on to state that “[CPCR] shall . . . seek the advice and opinions of the other [m]embers sufficiently in advance of undertaking or effecting any Major Decision . . . to permit other [m]embers ample opportunity to express their views and make recommendations.” Undertaking to sell “all or any portion of [Refinery Management’s] membership interest in [the Fee Owner]; and selling the Property or any portion thereof” are included in Second Operating Agreement § 6(b) as Major Decisions. *Id.* at § 6(b). CPCR is thus required to consult with other members of Refinery Management prior to taking action thereon. *Id.* To effect a Major Decision, CPCR must thus first give Plaintiff, a member of Refinery Management, an opportunity to express its views and make recommendations. CPCR then has complete discretion to follow or reject Plaintiff’s recommendations.

In exchange for CPCR’s sole decision-making authority, the Second Operating Agreement gave Plaintiff certain rights, as discussed below. Plaintiff argues that those rights will be excised from the agreement if CPCR goes through with the Proposed Transaction.

b. Plaintiff’s Rights

Plaintiff argues that, if CPCR effects the Proposed Transaction, it will be deprived of several of its bargained-for rights under the Second Operating Agreement. Namely, Plaintiff argues that it will lose its Second Operating Agreement § 6(b) consulting rights with regard

to Major Decisions. Plaintiff's Memorandum of Law in Support of its Motion for a Preliminary Injunction ("Plaintiff's Memo"), p. 14. Plaintiff also argues that the Proposed Transaction would excise certain other of its contractual rights from the Second Operating Agreement: the right to seek removal of CPCR as the Managing Member pursuant to § 6(m); the right to require CPCR to operate Refinery Management in "a manner to maximize profits" pursuant to § 6(i); the right of first refusal to control Refinery Management if CPCR decides to exit the project pursuant to § 8(d); and its § 11 right to exercise its "put" and require CPCR to either purchase Plaintiff's interest in Refinery Management or sell the property in satisfaction of Plaintiff's interest.

iii. Domino Mezz Loan Default

CPCR obtained the Domino Mezz Loan in 2007 to satisfy the then-existing mortgage and mezzanine lenders. Complaint, ¶ 68.

The Domino Mezz Loan, secured by a mortgage on the Property, matured in late 2011 and is now in default with roughly \$125 million in principal and interest past due. Affidavit of Susan Pollock ("Pollock Aff."), p. 3.

In order to cure the default on the Domino Mezz Loan and avoid the Lender's potential foreclosure on the Property, CPCR sought proposals from, and negotiated with, several potential investors to purchase the Domino Mezz Loan. *Id.*, at p. 4. As required by Second Operating Agreement § 6(b), CPCR consulted with Plaintiff about any proposed refinancing and followed-up with potential investors proposed by Plaintiff for such refinancing. *Id.* at p. 14.

CPCR presented several purchase offers for the Domino Mezz Loan to the Lender. *Id.* at p. 15. The Lender rejected every offer, including an offer to purchase the Domino Mezz Loan for \$100 million. *Id.* The Lender indicated that they would not accept an offer that did not give the Lender something very close to the \$125 million face value of the loan. *Id.*

In late 2011, CPCR began negotiating the Proposed Transaction with the Lender to convert the Lender's debt into equity in a new venture with Refinery Management. *Id.* at p. 20. Plaintiff seeks to enjoin CPCR from effecting the Proposed Transaction.

Plaintiff claims, for the first time in its reply, that it has a loan purchase offer from a "White Knight" investor on the exact same terms as the Proposed Transaction. Plaintiff provides no proof of this offer.

iv. The Proposed Transaction

On March 1, 2012, Refinery, by and through Refinery Management, executed with the Lender, Domino Mezz Holdings, LLC, a non-binding letter of intent (the "LOI") which encompassed the Proposed Transaction. *See Pollock Aff.*, p. 20. Under the Proposed Transaction, the Lender will convert its \$125 million debt position into equity in a new joint venture with Refinery (the "Joint Venture"). *Pollock Aff.*, p. 20. The Proposed Transaction is considered a Major Decision under the Second Operating Agreement. Second Operating Agreement, § 6(b). CPCR was thus required to consult with Plaintiff sufficiently in advance of undertaking the Proposed Transaction pursuant to the Second Operating Agreement.

CPCR claims that by December 1, 2011 it had informed Plaintiff's principal, Isaac Katan, that it was negotiating the Proposed Transaction. Pollock Aff., p. 20. On December 1, 2011, Susan Pollock, Senior Vice President of CPCR, e-mailed Isaac Katan a copy of the Lender's initial proposal and CPCR's initial response. *See id.* at Ex. 15. Another principal of Plaintiff, Uri Nussbaum, provided his comments on the Lender's initial proposal to CPCR on December 13, 2011. *See id.* at Ex. 16.

As per the LOI, the Lender will have an eighty-four percent equity interest in the Joint Venture. The LOI values Refinery Management's equity in the Property at approximately \$24 million. *Id.* Plaintiff and collective Defendants will therefore each have a \$12 million stake in the Joint Venture. Accordingly, Plaintiff will have an eight percent equity interest in the Joint Venture and Defendants will collectively share the other eight percent. *See Reply Affidavit of Itzhak Katan, Ex. A. (the "LOI"), pp. 1-2, Section Heading "Capitalization."*

Refinery Management is currently the sole owner of the Fee Owner. The Fee Owner is the sole owner of the Property. The Lender holds a \$125 million mortgage on the Property. Refinery Management thus has a one hundred percent interest in Property which is encumbered by a \$125 million mortgage.

Plaintiff has a fifty percent interest in Refinery Management. Plaintiff thus effectively has a fifty percent interest in the encumbered Property. If the Proposed Transaction is completed, Plaintiff's fifty percent interest in the encumbered property will become an eight percent interest in unencumbered Property.

Refinery Management is also currently the sole manager of the Property. CPCRC is the Managing Member of Refinery Management.

Under the terms of the LOI, the Joint Venture will have an executive committee composed of two members of Refinery Management and three members of the Lender (the “Executive Committee”). See LOI, p. 2, Section Heading “Management.” The Executive Committee will be in charge of making “major decisions,” as CPCRC is prior to the Proposed Transaction. The LOI does not define “Major decisions.” The court assumes, for the instant motion, that “major decisions” under the LOI are akin to Major Decisions as defined in the Second Operating Agreement. The Lender will therefore have the casting vote for all Major Decisions, but for those which are detailed in the LOI. *Id.* Plaintiff thus argues that, under the terms of the LOI, Plaintiff will lose several of its rights in the Second Operating Agreement by virtue of the Lender’s majority representation on the Executive Board. Accordingly, Plaintiff moves to enjoin CPCRC from effecting the Proposed Transaction.

v. Injunctive Relief Herein Sought by Plaintiff

Plaintiff argues that, in the absence of a preliminary injunction enjoining CPCRC from effecting the Proposed Transaction, it will “be forever deprived of valuable contractual and management rights for which it expressly bargained.” Plaintiff’s Memo, p. 14. As of the oral argument of April 5, 2012, the Lender had served CPCRC with a notice of default on the Domino Mezz Loan. April 5, 2012 Transcript, p. 58. Defendants believe foreclosure on the Property is imminent. *Id.* Defendants argue that if the court enjoins CPCRC from effecting

the Proposed Transaction, the Lender will foreclose on the Property and both parties will lose any interest they had in the Property to the foreclosure.

vi. *Underlying Allegations in the Complaint*

Plaintiff moves in the underlying action for breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing and negligent performance under Limited Liability Company § 409. Plaintiff also seeks an accounting and the removal of CPCRC from its position as Managing Member of Refinery Management. Plaintiff brings its claims against Defendants both individually and derivatively on behalf of Refinery Management. Complaint, ¶ 1.

Plaintiff alleges, *inter alia*, that CPCRC breached its fiduciary duties, the Second Operating Agreement, the implied covenant of good faith and fair dealing and negligently performed pursuant to Limited Liability Company § 409 by: mismanaging its own fees and fees paid to outside vendors; engaging in self-dealing by paying itself management fees; contracting with real estate company Cushman and Wakefield to locate a buyer for Defendants', but not Plaintiff's, interest in Refinery Management; and for failing to consider entities proposed by Plaintiff who were willing to refinance the existing debt on terms Plaintiff sees as more favorable than those in the Proposed Transaction. On these bases, Plaintiff seeks the removal of CPCRC as the Managing member of Refinery Management and an accounting.

2. Analysis

i. Standard of Law

In order to obtain a preliminary injunction under New York law, Plaintiff must demonstrate by clear and convincing evidence; (1) a likelihood of ultimate success on the merits of the claim; (2) irreparable injury absent the granting of the preliminary injunction (3) that the balance of the equities lies in its favor. *EdCia Corp. v. McCormack*, 44 A.D.3d 991, 993 (1st Dep't 2007). Harm compensable by monetary damages does not constitute irreparable injury. *Zodkevitch v. Feibush*, 49 A.D.3d 424, 425 (1st Dep't 2008).

ii. Irreparable Harm

Plaintiff seeks to enjoin CPCRC from effecting the Proposed Transaction. Plaintiff bases its motion on the allegation that the Proposed Transaction will allegedly cause irreparable harm by diluting Plaintiff's interest in the Property.

Plaintiff also argues that the Proposed Transaction would eliminate some of its rights under the Second Operating Agreement. Plaintiff alleges that it would lose its right to require that CPCRC conduct Refinery Management in a manner intended to maximize profits and cause the Fee Owner to do the same; its right to offer its views with regard to Major Decisions; and its rights to remove CPCRC as the Managing Member of Refinery Management and certain other rights discussed herein.

a. Dilution of Interest in the Property

Plaintiff argues that it currently has a fifty percent interest in the Property. Plaintiff contends that, if CPCRC effects the Proposed Transaction, its interest in the Property would

be diluted by forty-two percent to eight percent. Plaintiff's Reply Memorandum of Law in Further Support of its Motion for A Preliminary Injunction ("Plaintiff's Reply Memo"), p. 1. Plaintiff also contends that the Proposed Transaction is not the only alternative to foreclosure on the Property. Plaintiff claims, in its reply, that it has an alternative offer from a "White Knight" investor which is on the exact same terms as the Proposed Transaction. *Id.* Plaintiff provides no proof of the other offer.

Defendants do not dispute that both Plaintiff's and Defendants' respective interests in the Property will become eight percent interests if CPCR effects the Proposed Transaction. Defendants argue that, pursuant to Second Operating Agreement § 6(b), as Managing Member of Refinery Management, CPCR is expressly permitted to "[sell] all or any portion of [Refinery Management's] membership interest in [the Fee Owner]; and [to sell] the Property or any portion thereof." Second Operating Agreement, § 6(b).

Defendants further argue that Plaintiff's fifty percent interest is in Property that is encumbered by a \$125 million mortgage currently in default. Defendants' Memo, p. 10. Defendants argue that, if CPCR effects the Proposed Transaction, Plaintiff's fifty percent interest in fully-encumbered Property will become an eight percent interest in unencumbered property. Defendants contend that the Proposed Transaction thus protects Plaintiff's interest in the Property rather than harms it.

Defendants state that if the court enjoins CPCR from completing the Proposed Transaction, the Property will go into foreclosure. Foreclosure will result in the likely loss

of both Plaintiff and Defendants' equity in the Property. Finally, Defendants argue there is no feasible alternative to the Proposed Transaction.

The court finds that Plaintiff has not established that it will suffer irreparable harm in the absence of an injunction. *EdCia Corp.*, 44 A.D.3d at 993.

The Second Operating Agreement expressly contemplated CPR's power to sell the Property and/or Refinery Management's interest in the Fee Owner. This is precisely what the Proposed Transaction undertakes to do. Further, the record demonstrates that CPR met its obligation under the Second Operating Agreement to consult with Plaintiff in connection with Proposed Transaction.

Plaintiff authorized CPR to sell the Property and/or Refinery Management's membership interest in the Fee Owner when it signed the Second Operating Agreement. *See* Second Operating Agreement, § 6(b). Plaintiff cannot now claim that CPR's effecting a transaction which Plaintiff authorized CPR to undertake constitutes irreparable harm supporting a preliminary injunction.

Further, the court will not grant Plaintiff the extraordinary relief afforded by a preliminary injunction merely because Plaintiff claims a "White Knight" investor will match the same deal as the Lender. First, Plaintiff offers no proof that such "White Knight" exists. Second, Plaintiff's willingness to enter into an agreement that would equally dilute its equity interest in the property tends to show that the reduction in Plaintiff's interest that would result from the Proposed Transaction does not constitute irreparable harm.

b. Dilution of Plaintiff's Bargained-For Rights

The court is also not convinced by Plaintiff's argument that its "bargained-for rights" will be diluted if CPCRC effects the Proposed Transaction.

First, Plaintiff will still be able to exercise the majority of its Second Operating Agreement rights if the Proposed Transaction is completed. Plaintiff will still have its right of first refusal if Defendants wish to exit Refinery Management. Plaintiff can still cause CPCRC to purchase Plaintiff's interest in Refinery Management. Plaintiff will still be able to cause CPCRC, and to some extent the Fee Owner, to operate Refinery Management in a manner so as to maximize profits.

Second, Plaintiff will still be able to seek removal of CPCRC as the Managing Member of Refinery Management. Plaintiff will not be able to seek removal of the Lender, the proposed majority owner of the Joint Venture and Property. However, as discussed *supra* at § 2(ii)(a), the Second Operating Agreement contemplates CPCRC's ability to sell all or any portion of Refinery Management's membership interest in the Fee Owner as well as the Property. Second Operating Agreement, § 6(b). Though the Second Operating Agreement contemplates the sale of Refinery Management's interest in the Fee Owner and Property, the agreement does not state that Plaintiff shall be able to seek removal of any entity that may come to control the Fee Owner or the Property. The court thus does not find that any dilution of Plaintiff's right to seek removal of CPCRC as the Managing Member of Refinery Management constitutes irreparable harm.

Finally, the court does not here find that Plaintiff's Major Decision consulting rights are necessary to preserve an agreed-upon balance of power.

The cases cited by Plaintiff in support of this contention involved injunctions designed to preserve control of which the moving parties in those cases were expressly entitled. *See, e.g., Wisdom Import Sales Co., LLC v. Labatt Brewing Co.*, 339 F.3d 101, 104-05, 114 (2d Cir. 2003) (where the joint venture agreement required approval by a super-majority of partners for certain matters such that the minority joint-venture partner would have a minority veto, district court did not err in preliminary enjoining the implementation of a resolution that required, but did not receive, such super-majority approval); *see also Davis v. Rondina*, 741 F. Supp. 1115, 1123-26 (S.D.N.Y. 1990) (granting a minority shareholder a preliminary injunction where the shareholder agreement at issue specified that the minority shareholder was "to be responsible for the overall management of the business of the [c]orporation" and the majority shareholder sought to extinguish the minority shareholder's management role); *see also Bank of Am., N.A. v. PSW NYC LLC*, 29 Misc. 3d 1216(A) *34-36 (Sup. Ct. N.Y. Cty. 2010) (granting a preliminary injunction when one party breached the agreement at issue and the agreement specified that injunction would be available as a remedy to the non-breaching party in the circumstances).

Unlike in the cases above, the Second Operating Agreement does not anywhere specify that Plaintiff has voting rights or management control. *Compare* Second Operating Agreement *with Wisdom Import Sales*, 339 F.3d at 104-05, *and Davis*, 741 F. Supp. at 1123-26. Per Second Operating Agreement § 6(b), CPCR is required to consult with Plaintiff regarding Major Decisions. The ultimate decision-making authority, however, rests with

CPCR. Though the Lender will ultimately have majority control over the Joint Venture under the Proposed Transaction, Plaintiff never had any “vote,” let alone a casting vote for Refinery Management’s Major Decisions, under the Second Operating Agreement. Thus, the extent to which the Proposed Transaction dilutes Plaintiff’s consulting right is not directly comparable to the cases cited by Plaintiff. The court will not grant injunctive relief on this basis.

Additionally, the Second Operating Agreement does not provide for injunctive relief as a remedy for breach of the agreement like the agreement at issue in *Banc of Am., N.A.* does. *Bank of Am., N.A.*, 29 Misc.3d 1216 (A) at *34-36. The Second Operating Agreement does, however, provide a remedy to Plaintiff if Plaintiff wants to exit Refinery Management. Plaintiff can, at any time, require CPCR to purchase Plaintiff’s interest in Refinery Management at fair market value. Second Operating Agreement § 11. Plaintiff thus has an alternative remedy to preliminary injunction in these circumstances. On this ground, the court does not find that Plaintiff has established that it will suffer irreparable harm in the absence of an injunction. *EdCia Corp.*, 44 A.D.3d at 993. Plaintiff’s motion for a preliminary injunction is denied.

The court has considered Plaintiff’s remaining arguments and finds them unavailing.

Order

Accordingly it is hereby

ORDERED that plaintiff’s motion for a preliminary injunction restraining and enjoining defendants, their parent companies, subsidiaries, affiliates, employees, agents and

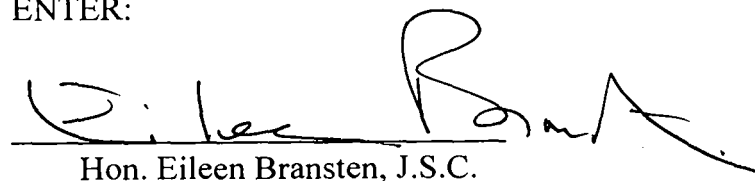
representatives, and all persons acting in concert with or on their behalf, from consummating the refinancing/restructuring transaction set forth in the letter of intent dated March 1, 2012 or any similar agreement with Domino Mezz Holdings, LLC, or any of its parent companies, subsidiaries, affiliates, and all persons acting in concert with or on their behalf, concerning a proposed joint venture relating to the acquisition and ownership of the properties located at Block 2414 Lot 1 and Block 2428 Lot 1 in Brooklyn, New York, commonly known as the Domino Sugar Refinery and/or The Refinery LLC and/or Refinery Management LLC is DENIED; further it is

ORDERED that plaintiff's motion for a preliminary injunction restraining and enjoining defendant CPC Resources, Inc. from undertaking or effecting any Major Decision as defined in section 6(b) of the Second Amended and Restated Operating Agreement of Refinery Management LLC dated September 10, 2007 is DENIED.

This constitutes the decision and order of the court.

Dated: New York, New York
April 30, 2012

ENTER:



Hon. Eileen Bransten, J.S.C.